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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 631

EMRAY REALTY CORP.,

Petitioner-Appellant,

v.

ROBERT C. WEAVER, as State Rent Administrator,

Respondent-Appellee.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS OR AFFIRM

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APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS OR AFFIRM

Appellee, the New York State Rent Administrator, moves, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, to dismiss or affirm on the grounds that (a) this appeal does not present any substantial constitutional question; (b) the judgment appealed from was based on an adequate non-federal basis and (c) the questions presented are so insubstantial as not to warrant argument.

Statement

This proceeding comes before the Court by virtue of a Notice of Appeal filed from a judgment of the Court of Appeals made on May 16, 1957 in *Emray Realty Corp.* v.

Weaver, 3 N. Y. 2d 771. There the Court, in denying appellant's motion for leave to argue the non-existent appeal, held:

> "A motion having heretofore been made herein upon the part of the appellant for leave to argue the above appeal or, in the alternative, to amend the remittitur and papers having been submitted thereon and due deliberation having been thereupon had, it is
>
> ORDERED, that the said motion be and the same hereby is dismissed upon the ground that no appeal is pending in this Court."

Obviously, such a ruling was not founded on any constitutional question—there simply was no appeal pending before the Court. Thus, this appeal should be summarily dismissed.

Contrary to the statements made by appellant (p. 1, App. Brief), the ruling of the Court of Appeals, dated April 4, 1957 (*Emray Realty Corp.* v. *Weaver*, 2 N. Y. 2d 973) has not been noticed for appeal to this Court. Time to file such notice has long since expired and any attempt to obtain review of that ruling is contrary to the rules of this Court and, therefore, should be rejected as jurisdictionally defective (28 U.S.C. 2101; *Department of Banking* v. *Pink*, 317 U. S. 264, 266-7).

The Administrator is therefore of the belief that the appeal should be dismissed for want of jurisdiction. Nevertheless, in the interest of a complete presentation of the case, this brief will be devoted to a showing that, even if an appeal properly lay from the April 4, 1957 ruling, the latter should be affirmed, or the appeal dismissed, on the merits.

In cases such as this, where a landlord applies to the Rent Commission for permission to withdraw from the rental market, the Administrator is charged, under the

State Rent Act, with the burden of determining whether the landlord in good faith seeks to withdraw his properties without any intent to rent or sell. This task is part of the Administrator's overall responsibility of guarding against exploitation of the housing shortage by unscrupulous persons. The cases are legion in which the State Rent Administrator has authorized withdrawal by sincere landlords.

The record in this case contained no credible evidence upon which a finding of good faith could be made. It constituted nothing more than statements by the attorney that landlord intended to withdraw the building from the rental market. No serious effort was made by the landlord to establish its good faith by valid objective criteria as required in Section 59 of the Commission's Regulations (*Asco Equities* v. *McGoldrick*, 258 App. Div. 381, aff'd 309 N. Y. 738). The Commission, therefore, denied the request to withdraw this building from the rental market at this time. Thus, this is simply a case in which this landlord has failed where others have succeeded.

It is our position that the Court of Appeals, in its judgment dated April 4, 1957, properly held that no substantial constitutional question was directly and necessarily involved. The matter throughout has turned on the independent State ground that there was substantial proof in the record to warrant the Administrator's finding of fact in this wholly administrative proceeding (*Grayson* v. *Harris*, 267 U. S. 352, 358; *Portland R. Co.* v. *Railway Comm.*, 229 U. S. 397, 411).

Appellant-landlord's attempt to obtain review by this Court is based on frivolous grounds and irresponsible conclusory statements. The temper of the appeal is exemplified by the wholly irresponsible charges levelled against the Supreme Court, the Appellate Division and the Court of Appeals of the State of New York. Appellant (p. 7, App. Br.), referring to the decisions ren-

dered by the Courts in this case, states:

> "Back of such refusal is the tremendous adverse publicity received by appellant and its attorney."

Out of the same cloth appellant has fabricated the scandalous charge, made for the first time in this proceeding, that its witnesses did not appear because they were threatened and intimidated by the Rent Commission of the State of New York.

In addition, the appellant has injected numerous references to criminal convictions, Bar Association and Internal Revenue investigations of its attorney of record, Arnold Schildhaus. These never were part of the proceedings before the State Rent Administrator. Nor was the State Rent Administrator party to or involved in such matters. These are the personal problems of the appellant's attorney with the various agencies and law departments of the City of New York. They have no place whatsoever in this appeal or in the record.

Thus the factual picture in this record is substantially different from that which appellant has attempted to paint in its brief. Accordingly, the Commission deems it desirable to state the facts.

The Facts:

This proceeding concerns a Harlem tenement located in the City of New York. It is subject to the provisions of the New York State Emergency Housing Rent Control Laws and Regulations.

On January 14, 1955 the State Rent Administrator, upon a remission ordered by the Appellate Division, First Dept. (*Emray* v. *McGoldrick*, 284 A. D. 880), had, after investigation and formal hearing, reaffirmed its determination that it was the obligation of the landlord to provide interior and exterior repairs to the building. Con-

sequently, the Administrator reduced rents throughout the building, because of the failure of landlord to provide those services.

The landlord sought judicial review (Article 78 C.P.A.) at Special Term of the Supreme Court. The Commission's ruling was upheld. Landlord again appealed to the Appellate Division, First Dept. Having previously remitted the matter, the Court now denied the appeal by a unanimous bench, ruling that the record fully supported the Administrator's findings on all issues. (*Emray* v. *Abrams*, 285 A. D. 1146.)

Landlord then appealed directly to the Court of Appeals, urging that there was a constitutional question directly involved (*Emray* v. *Abrams*, 309 N. Y. 888). There, for the first time in these proceedings, landlord raised the question of withdrawing the building from the rental market. Heretofore, the only issues before the Courts and the Commission were the obligation to make repairs and the reduction of rents. The question of withdrawal was not in issue. At that time, there had been in the record no application, no facts and no supporting papers filed by the landlord for certificates authorizing the withdrawal of the building from the rental market.

Acting on the landlord's direct appeal, the Court of Appeals in November, 1955 (*Emray* v. *Abrams*, 309 N. Y. 888), remitted the entire proceeding to the State Rent Commission, extending to the landlord an opportunity at a full hearing to establish a case for withdrawal from the rental market. (Appellant's statement that in *Emray* v. *McGoldrick*, 307 N. Y. 772, the Court of Appeals rendered an opinion in this case, is misleading. That ruling long preceded this matter, having been decided in July, 1954—over 3½ years ago—and no appeal was taken to this Court.)

Thus, the mandate of the Court of Appeals was that the Administrator reprocess this case and, in addition, apply

the objective standards of Section 59 of the Rent and Eviction Regulations, which the Court had already declared to be both valid and constitutional (*Asco Equities* v. *McGoldrick*, 309 N. Y. 738). In other words, the case was reduced to the simplest type, in which the State Rent Administrator, in the proper exercise of his authority, was to make a finding on the facts and the evidence in the record before him. The Commission did precisely that and made no departure whatever from the mandate of the Court of Appeals.

1. Proceedings Before the Commission Following Remission by the Court of Appeals

A hearing was conducted on January 30 and 31, 1956 at the Principal Office of the Commission at which stenographic minutes were taken. Landlord submitted no credible evidence as to the cost of correcting the violations on the building. There was no statement in any form by a builder, contractor, or even by any member of the landlord corporation. The principals of the corporation were said to be a Mr. Cohen who lives in California, and a Mr. Brand who lives in Texas. But they never submitted any affidavits, and never appeared in this or any other proceeding. Bills and checks were in complete conflict. Some checks never cleared any bank. Only one check bore the name of the appellant as payee. All others were in the name of another corporation. Mr. Schildhaus, attorney for landlord, made all the affidavits with no supporting credible data. He alone testified under oath for a day and a half "as assistant vice-president, strictly for the purpose of litigation and to wind this thing up."

At the conclusion of the hearing, the Commission sought to obtain an audit of the books and records of the corporation. However, the attorney for the landlord, after testifying that they were in his possession and would be available for audit, refused to submit them.

The Commission reviewed all the evidence submitted and found it to be in hopeless conflict. There was nothing which would support the allegation of the landlord that it intended in good faith to remove the building from the rental market.

On this record, the State Rent Administrator on May 23, 1956, ruled in a 17-page opinion that the landlord had failed to establish, as required by law, that it intended in good faith to permanently withdraw the building from the rental market without any intent to rent or sell.

Further the Commission re-affirmed its previous order, holding that it was this landlord's obligation under the Rent Law to furnish to its tenants those services included in the maximum rents. In this regard it is to be noted that landlord's attorney testified that landlord availed itself of the benefits of the Rent Law, during the pendency of the proceedings and obtained increases in rents based on restoration of some services.

2. Judicial Rulings on the Commission's Order

The landlord then commenced the involved proceedings to set aside the Commission's ruling, before the Supreme Court, the Appellate Division and the Court of Appeals, which led to the instant appeal. Every court unanimously upheld the Rent Administrator. In each instance the decision of the Court was predicated on the non-constitutional issue of whether, on the record before him, the State Rent Administrator was arbitrary or capricious. This is quickly apparent from the following sequence of judicial determinations.

July 7, 1956

Special Term of the Supreme Court (Lupiano, J.) dismissed landlord's petition, brought under Section 1283, *et seq.*, of the Civil Practice Act, to review the State Rent Administrator's order and opinion of May 23, 1956.

The Court found there was sufficient warrant in the record both in fact and in law. (*Emray* v. *Weaver,* N.Y.L.J., July 7, 1956, Sup. Ct., N. Y. Co.,—not otherwise reported.)

October 18, 1956

The Court of Appeals granted the Rent Administrator's motion to dismiss landlord's direct appeal, brought under Section 588, Subd. 4, of the Civil Practice Act. The seven Judges of the Court found that there were questions involved other than the validity of a statutory provision of the State or Federal Constitutions. (*Emray* v. *Weaver,* 2 N. Y. (2d) 748.)

February 6, 1957

Landlord, exercising its statutory right, then appealed the ruling of Special Term (Lupiano, J.) to the Appellate Division. The five Judges of that Court, after hearing extensive argument, and after a searching interrogation of landlord's attorney, unanimously upheld the ruling of the State Rent Administrator. (*Emray* v. *Weaver,* 3 A. D. (2d) 697, 1st case.)

April 4, 1957

The Court of Appeals, acting on the Commission's motion to dismiss landlord's second direct appeal—this time under Subd. 1, of Section 588 of the Civil Practice Act and from the Appellate Division ruling—held that no substantial constitutional question was present. This decision was dispositive of the case. (*Emray* v. *Weaver,* 2 N. Y. (2d) 973.)

May 16, 1957

The Court of Appeals dismissed a subsequent motion brought by landlord to argue the appeal or amend the remittitur. The stated ground for dismissing was that

no appeal was pending in the Court. (*Emray* v. *Weaver*, 3 N. Y. (2d) 771.)

This is the ruling which landlord has noticed for appeal to this Court—no other.

Argument

1. The Historical Background

The legislation which is challenged here did not come into being by sheer chance. Rather, it was the result of the culmination of public hearings and intensive study every two years by the Legislative Committee, which has kept its finger on the rent control pulse since 1948. (See the Report of the Temporary Commission created to Study Rents and Rental Conditions, dated March 20, 1957, McKinney's 1957 Session Laws of New York, pp. 1535 *et seq.*)

The Court is asked to take judicial notice of Governor Harriman's special message to the Legislature on January 23, 1957, recommending continued rent control (McKinney's 1957 Session Laws of New York, pp. 1733 *et seq.*) because: "Regrettably, the day when rent controls can be eliminated throughout New York State has not yet arrived": and because "Continued shortage of housing accommodations has made it imperative that all possible steps to improve existing residential buildings be taken." Immutable evidence in support of this legislation is found in that part of the message subtitled "The Existing Housing Shortage." There, the Court will find full verification of the above statements, together with supporting facts and statistics compiled by the United States Bureau of the Census.

Clear recognition of the continued housing shortage of emergency proportions in New York State is mirrored in the Majority and Minority Reports of the Temporary Commission to Study Rents and Rental Conditions (Legis-

lative Document (1957) No. 22), which were prepared after a public hearing, and were transmitted to the Legislature on March 20, 1957. Attention of the Court is particularly directed to that portion of the Majority Report subtitled "Emergency" (p. 20) where, after a lengthy review of the Act's historical background, the judicial approval of its constitutionality, and the statements and testimony obtained at the public hearings, it stated:

> "It is abundantly clear, the Commission finds, that the emergency which made it imperative for the Legislature to invoke the police power on behalf of the tenants as a stop-gap in 1946 and as necessity since 1950, continues to exist unevenly in those areas of the state subject to rent and eviction controls."

The minority report concurred and recommended tighter control. Thus, this acute housing shortage which gave rise to emergency legislation is a matter of public knowledge.

2. No Substantial Constitutional Issue Is Presented

The principles by which to test the constitutionality of a statute resting on the police power have been asserted over and over again. A legislative enactment carries with it a strong presumption of constitutionality, i.e., it is presumed to be supported by facts known to the legislature. *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152; *South Carolina State Highway Dept.* v. *Barnwell Bros.*, 303 U. S. 177, 191; *Carmichael* v. *Southern Coal & Coke Co.*, 301 U. S. 495, 509-510; *East New York Saving Bank* v. *Hahn*, 293 N. Y. 622, 627-28, affirmed 326 U. S. 230. The Courts may not be concerned with questions as to the reasonableness, wisdom, propriety, or desirability of such a statute; nor may they substitute their judgment for that of the legislature so long as there can be discovered "any state of facts either known or which could reasonably be assumed" to afford support for the legislative decision to

act. *United States* v. *Carolene Products Co., supra,* 304 U. S. 144, 154; *East New York Saving Bank* v. *Hahn, supra,* 326 U. S. 230, 234; *South Carolina Highway Dept.* v. *Barnwell, supra,* 303 U. S. 177, 191; *Borden's Farm Products Co.* v. *Ten Eyck,* 297 U. S. 251, 263.

In *East New York Saving Bank* v. *Hahn, supra,* the constitutionality of the mortgage moratorium statute, originally enacted in 1933, and extended to July, 1944 by Ch. 93, L. 1943, was challenged. Plaintiff urged that "the serious depression and emergency • • • no longer existed at the time of the enactment of Ch. 93 of L. 1943, had not existed for several years and does not now exist." This Court in affirming wrote (p. 234):

> "Appellant asks us to reject the judgment of the joint legislative committee, of the Governor, and of the legislature, that the public welfare, in the circumstances of New York conditions, requires the suspension of mortgage foreclosures for another year. On the basis of expert opinion, documentary evidence, and economic arguments of which we are to take judicial notice, it urges such a change in economic and financial affairs in New York as to deprive of all justification the determination of New York's legislature of what New York's welfare requires. We are invited to assess not only the range and incidence of what are claimed to be determining economic conditions insofar as they affect the mortgage market—bank deposits and war savings bonds; increased payrolls and store sales; available mortgage money and rise in real estate values—but also to resolve controversy as to the causes and continuity of such improvements, namely the effect of the war and of its termination, and similar matters. Merely to enumerate the elements that have to be considered shows that the place for determining their weight and their significance is the legislature not the judiciary. • • •"

The statutory protection of tenants in the continued possession of their homes during such shortage as an appropriate and effective means of counteracting the evils attendant on the shortage has long since been upheld as constitutional (*People ex rel. Durham Realty Corp.* v. *LaFetra*, 230 N. Y. 429; *Block* v. *Hirsh*, 256 U. S. 135; *Marcus Brown Co.* v. *Feldman*, 265 U. S. 170; *Edgar A. Levy Leasing Co. Inc.* v. *Siegel*, 285 U. S. 242).

Rent control itself, as an exercise of the federal war power or state police power, has been upheld by this Court to be constitutional (*Bowles* v. *Willingham*, 321 U. S. 503 (1944); *Marcus Brown Holding Co.* v. *Feldman, supra*). This particular New York State Act, as was adopted in 1950, was upheld by the highest Court of New York in an exhaustive opinion in *Teeval Co. Inc.* v. *Stern*, 301 N. Y. 346 (1950); certiorari was denied, 340 U. S. 876.

The present Emergency Housing Rent Control Law of the State of New York, Ch. 755 of the Laws of 1957, subd. 1044) like its predecessors, carefully guards the constitutional rights of property owners, specifically providing that no person will be required to offer any housing accommodations for rent. However, housing accommodations already on the rental market may be withdrawn only after written approval of the State Rent Commission, where withdrawal requires that a tenant be evicted from such accommodations (Section 59, Rent and Eviction Regulations). The law is well-established that while a landlord does have a constitutional right in the proper case to withdraw a building from the rental market, that right is not an unqualified one. The New York Court of Appeals so ruled in *Loab Estates* v. *Drube*, 300 N. Y. 176; *Asco Equities Inc.* v. *McGoldrick*, 285 App. Div. 381, aff'd 309 N. Y. 738; and again in *Emray Realty Corp.* v. *McGoldrick*, 307 N. Y. 772.

When the State of New York took over the administration of controls in 1950 (New York Emergency Housing

Rent Control Law, McKinney's Unconsolidated Laws, Section 8581 et seq.), all rents continued to be frozen at the 1943 federal rent level. In 1951, however, the State Law was amended to authorize the granting of rent increases where the State Rent Administrator found that a property was not yielding a specified "fair return" [id. at § 8584(1), subd. 4(a)(1)]. A provision of this type had been in effect under federal law for only one year, from 1949 to 1950. *Bowles* v. *Willingham*, 321 U. S. 503 (1944) and *Teeval Co. Inc.* v. *Stern*, 301 N. Y. 346 (1950) certiorari denied 340 U. S. 876, had, it should be emphasized, upheld the constitutionality of the Federal and State Rent Control Laws, respectively, without any such "fair return" provision at all. The return guaranteed by the Rent Act is 6% of the current assessed valuation.

Thus the Rent Act not only permits a landlord to withdraw from the rental market but insures a fair return to those who continue to rent their properties.

3. The Decisions Below Rested on Non-Federal Grounds

Finally, the decisions of all the Courts below rested wholly on the non-federal ground that there was warrant in the record for the Rent Administrator's finding of fact. This Court has consistently held that, before it will exercise its jurisdiction to review a decision of a State Court, it must affirmatively appear from the record not only (a) that a federal question was presented for decision to the highest Court of the state having jurisdiction, but (b) that its decision of the federal question was necessary to the determination of the cause, and (c) that said federal question was actually decided or that the judgment as rendered could not have been given without deciding it. *De Saussure* v. *Gaillard*, 127 U. S. 216, 234; *Johnson* v. *Risk*, 137 U. S. 300, 306, 307; *Wood Mowing & Reaping Machine Co.* v. *Skinner*, 139 U. S. 293, 295, 297; *Eustis* v. *Bolles*, 150 U. S. 361, 366, 367; *Whitney* v. *California*, 274 U. S. 357, 360, 361; *Mellon* v. *O'Neil*, 275 U. S. 212, 214.

Even where the judgment of the State Court rests on two grounds, one involving a federal question and the other not, or if it does not appear upon which of two grounds the judgment was based, and the ground independent of a federal question is sufficient in itself to sustain it, this Court will not take jurisdiction. *Allen* v. *Arguimbau*, 198 U. S. 149, 154, 155; *Johnson* v. *Risk*, *supra*; *Wood Mowing & Reaping Machine Co.* v. *Skinner*, *supra*; *Cuyahoga River Power* v. *Northern Realty*, 244 U. S. 300, 302, 304; *Hedgebeth* v. *North Carolina*, 334 U. S. 806; *Stembridge* v. *Georgia*, 343 U. S. 541, 547.

The appeal should be denied since landlord cannot establish a case within the framework of the sound criteria set forth in this Court's rulings.

We submit that the housing shortage of emergency proportions in New York, and the State's continuation of rent controls to meet that shortage, is an entirely local problem for decision by the New York State Legislature. Certainly, the particular judicial ruling challenged by the instant landlord involved a wholly state, and non-federal matter.

CONCLUSION

The order of the New York Court of Appeals is correct, and does not warrant further review by this court. Appellant presents no substantial federal question, and its appeal should be dismissed.

Dated: December 4, 1957.

Respectfully submitted,

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APPENDIX I

Statutes and Regulations Involved

Section 10(4) of Chapter 755 of the Laws of 1957 provides:

(4) Nothing in this act shall be construed to require any person to offer any housing accommodations for rent, but housing accommodations already on the rental market may be withdrawn only after prior written approval of the State Rent Commission, if such withdrawal requires that a tenant be evicted from such accommodations.

Section 59 of the Commission's Rent and Eviction Regulations provides:

Section 59. Withdrawal of Occupied Housing Accommodations From Rental Market. A certificate shall be issued where the landlord establishes that he seeks in good faith to permanently withdraw occupied housing accommodations from both the housing and non-housing rental markets without any intent to rent or sell all or any part of the land or structure and (1) that he requires the entire structure containing the housing accommodations or the land for his own immediate use in connection with a business which the landlord owns and operates in the immediate vicinity of the property in question, or (2) that substantial violations affecting the health and safety of the tenants have been placed on the structure containing the housing accommodations by the local authorities having jurisdiction over such matters and that the cost of removing these violations would substantially equal or exceed the assessed valuation of the structure, or (3) where the landlord is a hospital, convent, asylum, public institution, college, school or any institution operated exclusively for charitable or educational purposes on a non-profit basis and requires the housing accommodations or the land for its own immediate use in connection with its charitable or educational purposes, or (4) that the continued operation of the housing accommodations would impose other undue hardship upon him. No certificate shall be issued under this section where the granting of a certificate is inconsistent with the purposes of the Act.